EQUITABLE REDEMPTION OF A MORTGAGE AFTER FORECLOSURE.—S was the owner of land subject to three successive mortgages held by A, B, and C respectively. B's incumbrance was for a loan of $1,500, for which S subsequently gave B, as additional security, notes of D for an equal amount. C assigned his mortgage to B and B foreclosed it by advertisement and sale, himself purchasing at the sale subject to prior incumbrances. During the statutory period of redemption D and E paid B the $1,500 due on their notes, which B accepted and retained. S being out of the state most of the time and ignorant of whether there had been a foreclosure sale, or, if there had, when the year of redemption expired, on several occasions applied to B for information and was always turned away with evasive and vague answers until the statutory period expired without his knowledge. Afterwards he brought his bill to redeem. The trial court found the land of sufficient value to pay all incumbrances. *Held,* that S might redeem from the foreclosure sale. Nothing is said as to redemption from the second mortgage but, as that debt had been paid, the decree presumably provided for its discharge. *Sletten* v. *First Nat. Bank of Carrington* (N. D. 1917), 163 N. W. 534.

This decision is rested on two grounds, the first of which is that B had defeated S's statutory right of redemption by acts of bad faith.

The statutes allowing redemption from a foreclosure sale have been held to be strictly mandatory and to be complied with literally. *Teabout* v. *Jaffray and Co.,* 74 Ia. 29, 7 Am. St. Rep. 465, and cases collected in note p. 469. Failure to redeem during the statutory period because of ignorance or negligence are not grounds for subsequent redemption. *Campau* v. *Godfrey,* 18 Mich. 27. Nor will inability to attend to business because of physical or mental debility be grounds for relief, *Wallace* v. *Monroe,* 22 Ill. App. 602.

On the other hand, although the law has been fully complied with, equity may allow a subsequent redemption where the statutory right is rendered nugatory by fraud, or unfair conduct. A parol agreement to extend the time beyond the statutory period has been held binding. *Southard* v. *Pope's Executor,* 9 B. Mon. 261. *Butt* v. *Butt,* 91 Ind. 305. *McMakin* v. *Schenck,* 98 Ind. 264. *Guinn* v. *Locke,* 38 Tenn. 110. These cases are not based primarily on the ground that there is an enforceable contract, but upon the ground that the promise makes it inequitable for the purchaser to retain his legal advantage. It would seem to follow that any conduct which lulls the mortgagor into security or inaction until the statutory period has expired gives him a right to redeem subsequently.

In the case of *Graffam* v. *Burgess,* 117 U. S. 180, land was sold on an attachment and judgment *in rem,* the judgment debtor at the time being in another state. Valuable real estate was chosen when a great amount of chattel property was available, a single piece of which would have satisfied the judgment. The property was sold for a pittance to the judgment creditor. During the year of redemption the judgment debtor lived on the premises for part of the time expending large sums in its repair, all of which the judgment creditor knew, he keeping constant watch of her movements and taking every practical precaution to keep her in ignorance until the year of redemption had expired. When the period had expired he took possession.

The Supreme Court allowed subsequent redemption on the ground of "fraud." Justice Miller, with whom concurred Justices Woods, Matthews and Gray, dissented, saying, "In addition to the sanctity which the law concedes to judicial sales, founded on well-considered reasons of policy as old as the law itself, the favor of allowing the debtor one year more to save his land, after judgment and sale under execution have fixed his rights, only adds to his obligation to exercise the right thus granted in strict accordance with its terms * * * Yet after Graffam had acquired a complete legal title under judicial proceedings which were unimpeachable, the court treats the case as if the whole matter was still *in fieri* and gives further time for redemption. * * * I dissent from the judgment and opinion of the court as leading to evil results, in discrediting judicial sales, and embarrassing the due and just exercise of the right of redemption, by turning it into a question of judicial discretion." Despite the vigor of the dissent, this case has never been impeached by the Supreme Court and has at least been cited once as authority without criticism. *Brophy* v. *Kelly,* 211 Fed. 22. See also *Hammersham* v. *Fairall,* 44 Ia. 462; *Palmer* v. *Douglas,* 107 Ill. 204.

It is to be noted that in the case of *Graffam* v. *Burgess,* above, the Supreme Court laid stress on the fact that the judgment debtor was a woman unskilled in business, suggesting a distinction if she were a man capable of taking care of his business, pp. 185-86; that in *Hammersham* v. *Fairall, supra,* the mortgagor was an ignorant woman and that in *Palmer* v. *Douglas, supra,* the mortgagor was an aged and illiterate man.

In the principal case the Supreme Court of North Dakota saw fit to allow redemption where the statutory requirements were fully complied with, and the mortgagor was a man requiring no exceptional protection. The fraud is summed up in this conclusion of the court: "When Sletten's obligations to the bank are compared with the security given and realized upon, and when consideration is given to the rather indefinite and somewhat evasive answers of Newberry in response to requests for information, continuing almost to the very date of the expiration of the period of redemption, it can hardly be said that the bank acted with that degree of good faith that would be manifested by one whose sole interest was to collect a debt justly owing with interest and costs."

The case goes further than prior decisions, but seems not to exceed the principles of equitable control of legal rights.

The second ground of the decision of this case was that when B purchased on the foreclosure of the third mortgage, subject to the prior mortgages, the land became the primary fund for the payment of the prior mortgages; that, as the second of these mortgages was owned by B, that mortgage merged in the equity of redemption which he had acquired by the purchase, and the second mortgage debt was discharged; and that, by subsequently accepting payment of that debt, B waived his rights as a purchaser and treated the land as a mere security for the payment of both debts.

This application of the doctrine of merger, while exceptional, seems satisfactory. That, in such a case, there is a merger, and that, where the land is amply sufficient to pay all incumbrances, the mortgage debt is thereby satis-

fied, is supported by the cases cited by the court. See also *Jackson* v. *Tift,* 15 Ga. 557; *Knowles* v. *Lawton,* 18 Ga. 476; *Northwestern Bank* v. *Stone,* 97 Ia. 183; *Spencer* v. *Harford,* 4 Wend. 381. Given the discharge of the senior mortgage by merger, a subsequent payment of the senior mortgage debt involves an unjust enrichment of the mortgagee. The natural remedy therefor would seem to be restitution to the mortgagor of the money so paid, but in this case the mortgagor seeks to recover his land on the theory of redemption. That accepting subsequent payment of a debt satisfied by foreclosure, or otherwise recognizing its continuing existence, is a waiver by the purchaser of the right to an indefeasible title and a treating of the land as security is sustained by authority. *Williams* v. *Bolt,* 170 Mich. 517; *Lounsbury* v. *Norton,* 59 Conn. 170; *Southard* v. *Pope's Executor, supra.* It would seem, by analogy, that the court is justified in holding that acceptance of payment of the debt discharged by merger, incidental to the foreclosure, has the same effect. It should be noted, however, that where a statutory right of redemption from foreclosure sale exists, the foreclosure is incomplete or inchoate during the period of redemption. It would seem to follow that during this period the purchaser in our case was entitled to receive payment on his senior mortgage and to retain such payment if redemption was ultimately made. But since no redemption was made the foreclosure may be regarded as having been perfected *ab initio,* and the doctrine of merger may be applied as if no period of redemption had intervened.

R. A. F.

Liability of Public Officer for the Loss of Private Funds Entrusted to His Keeping.—There is much contrariety of decision concerning the liability of public officers for the loss of funds with which they have been entrusted. A recent case illustrates some of the more important phases of the law of such a situation. *People for use of Hoyt et al.* v. *McGrath et al.* (Ill. 1917), 117 N. E. 74. In this case the public brought an action of debt on the official bond of the clerk of court for the use of Hoyt and others. Usees had tendered into court a sum of money which the clerk took under the court's order to receive and hold it, but refused to pay it over to the usees as directed by a later order of the court, claiming the money had been received by him in his individual capacity and had been lost without his fault by the failure of the bank in which it had been deposited. *Held,* that as a public officer is liable as an insurer for private funds received by virtue of his office, the failure of the clerk to pay over the money in question constituted a breach of his official statutory bond.

The public officer, on the theory of the existence of a debtor-creditor relation between the public corporation and the officer with respect to the public funds in his possession, on the ground of public policy, because the loss ocurs by reason of the unauthorized acts of the officer, as for example, the unauthorized deposit of public funds in a bank which later fails, or on account of the language of the bond or of the statute defining the duties of the officer, is generally held absolutely liable as an insurer for the safety of